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OGC Has Reviewed

21 March 1955

Memorandum for: Director of Personnel

Subject : Restriction of Residence of Former Employees

References : (a) Memorandum dated 24 January 1955 from Chief of Operations (DD/P) to Chief, DD/P-Admin re [redacted] 25X1A9a

(b) Memorandum dated 1 March 1955 from Director of Personnel to the General Counsel

1. The references discuss the possible need for preventing employees who have served abroad from taking up residence in the country or countries in which they have served. Without detailed information as to the particular circumstances which prompted the writing of the referenced memoranda, it is possible only to speculate as to possible objectives to be attained by such restrictions and possible ways of attaining them.

2. In the course of several hundred years, considerable law has developed on the subject of agreements to restrict the activities of former employees. Clear cut conclusions are difficult to draw from a rapid survey of this body of law beyond the general statement that restrictive agreements must be reasonable. Reasonableness is determined by a balancing of the interests which the employer seeks to protect against the detriment to the employee in the light of possible detriment to society. In other words, the restrictions placed on an employee must not be wider than necessary to afford reasonable protection to the employer in some legitimate interest and not unreasonably restrictive of the personal liberty of the employee and his ability to remain a useful member of society.

3. Reasonable protection to an employer's interest is limited to his business interest within the limits of space and time in which competition could be expected to be injurious. Moreover, such protection is related to the nature of the information which an employee acquired or was likely to acquire in the course of his employment and the amount of injury he could be expected to work by subsequent competition with his former employer. Thus, the competitive use of trade secrets may be the subject of a valid restrictive agreement but skills and generally available knowledge may not be even though acquired by virtue of the employment and even

though actual injury occurs. Similarly, a restrictive agreement may be enforced against a key employee but not against an unskilled or semi-skilled employee whose subsequent activities could not reasonably be expected to injure the employer.

4. As between private parties, an agreement not to accept any employment in a given country would be wider than reasonably justifiable protection of the employer's business since it would include wholly non competitive and non injurious activities. Moreover, it would probably not be enforceable on the grounds that it is against public policy as well as being an unreasonable limitation on the personal freedom of the employee. A fortiori an agreement not even to reside in a given country would be unenforceable. In fact, an agreement not to accept any employment in a given country would seem to be equivalent to an agreement not to reside in that country since a private source of income with respect to any particular employee would be irrelevant to a decision as to the enforceability of an agreement of this sort.

5. Obviously, CIA is not comparable to a private employer except possibly with respect to its covert proprietary commercial organizations. Nevertheless, some of the principles of law discussed above may be analogous. In order to determine this point, however, it is necessary to analyze the nature of the interest to be protected.

6. Probably the paramount interest is the maintenance of security - as to information, sources of information and cover of personnel and organizations. But security is dependent upon the nature of the individuals concerned and the legal sanctions applicable to them. The principle of compartmentation and dissemination of information on a need-to-know basis rests on the proposition that all persons possessing classified information are to some degree security risks. Strong incentives exist on the part of employees to be cautious in their handling of sensitive information. However, on termination of employment these incentives weaken and the security risk increases correspondingly so long as the information involved remains sensitive. Former employees therefore constitute security risks wherever they live and the risk involved is only marginally greater with respect to some employees in foreign countries where they have been stationed. Similarly, the nature of employment taken after leaving CIA has very little effect on the security risk presented by that employee (unless, of course, his new job happens to be with the opposition). It follows therefore that an agreement by CIA employees to refrain from accepting any employment would not materially decrease the security risk nor would its equivalent, an agreement to refrain from residing in a particular country.

7. The other interests which CIA might seek to protect by restrictive agreements with its employees are less distinct. They may include the prevention of the disruption of contacts with intelligence sources, diversion or exposure of agent networks, general embarrassment to the United States resulting from words

and actions of the individual concerned, and harmful competition with proprietary or other organizations in the success of which CIA has a direct interest. With respect to all of these interests, location of a former employee is, of course, of considerable significance. An agreement between an employee and a proprietary organization not to engage in competition with it could be reasonable and effective in countries which follow the Anglo-American principles of law. However, it is improbable that an agreement not to engage in business activities likely to divert or disrupt agent networks or to impair contacts could be drawn in such a way as to be enforceable without entailing a breach of security. The prevention of general embarrassment clearly is possible only by exclusion of former employees from the countries in which they have served. An agreement for such exclusion would be clearly unenforceable as between private parties. I submit that it would be unenforceable as between the Government and even one of its key employees as being an unreasonable limitation on his personal freedom and as being a restriction wider than any reasonably necessary protection in that it can not be presumed that the mere presence of the person concerned, however well behaved, would result in embarrassment.

8. The above discussion is largely a speculative exercise to define the problem in the light of established principles of law. As a practical matter it is inconceivable that CIA, or any other United States Government agency, would ever resort to the courts of a foreign country as a party seeking to enforce a restrictive agreement with a former employee. It has been suggested that even though not enforceable by court action, restrictive agreements with CIA employees as to their future location would have some moral value. Against any such moral value, however, must be balanced the impact on morale of the imposition of another restriction on top of the burdensome restrictions and risks to which CIA employees are already subject. In this connection it should be borne in mind that the moral effect of such an agreement is only as great as the moral consciousness of each employee. I submit therefore that an agreement by an employee not to reside (or accept employment) in a given country would not exclude those willing to break an agreement but it would seriously impair the morale of those likely to honor such agreements.

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Assistant General Counsel

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